

# *Fordham International Law Journal*

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*Volume 23, Issue 6*

1999

*Article 1*

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## The Need for Affirmative Action

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# The Need for Affirmative Action

Karl M. Meessen

## **Abstract**

This article provides an introduction to the Symposium on the Competition Law of Deregulation. It surveys recent developments in this area and comments briefly on the symposium participants' contributions that are included in the book.

# ESSAYS

## INTRODUCTION:

### THE NEED FOR AFFIRMATIVE ACTION

*Karl M. Meessen\**

#### I. *THE ECONOMIC ANALYSIS OF THE LAW APPROACH*

Are the effects of regulation actually known? Only if they are, or were, can we design the proper route towards deregulation. Furthermore, experience shows that deregulation is hardly ever complete. How are we to predict its outcome? Judge Richard Posner's observations, set out in the very first paragraph of his paper, highlight the audacity of discussing the competition law of deregulation within a forty-eighty hour symposium. It was a *mission impossible*, albeit one befitting the Weimar venue, since it was in Weimar, the "Cultural City of Europe 1999," where, some two hundred years ago, Johann Wolfgang von Goethe had written the drama of Faust whose predicament it was to strive for ever higher goals.

Very much down-to-earth, Posner provided the tools of economic analysis theory that allow us to tell misdirected regulatory incentives from well-directed ones. Deregulation is bound, he said, to proceed through tailor-made industry-by-industry and country-by-country solutions. For purposes of legal and economic research, however, looking beyond a particular industry in a particular country is an absolute necessity.

#### II. *LOOKING BEYOND NATIONAL BOUNDARIES*

Turning to the United States and focusing on securities regulation, Arthur Laby from the Securities Exchange Commission—as all the others disclaiming to speak on behalf of his agency—explained when and how securities brokers were made subject to prohibitory rules while advisers were granted the privilege of being merely exposed to disclosure obligations. Laby de-

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fended that legislative technique as matching the respective functions of, in the one case, shifting decision-making to the provider of the service, or in the other case, of leaving it with the customer. Peter Nobel, a Zurich attorney, professor in St. Gall, and a member of the Swiss Federal Banking Commission, pointed to self-regulation of the financial community through codes of conduct as an alternative worth considering. Economic analysis of the law indeed suggests confining regulatory intervention to the minimum necessary to achieve the respective goal, which, of course, depends on the respective business environment.

Japan is a special case. Yoshio Ohara, professor of competition law at Kaganawa University, explained the administrative-guidance-led regulatory culture of his country and proceeded to identify with regard to the Japanese policy of deregulation both the external motives—U.S. and European Union pressure—and internal motives—stimulating innovation and increasing demand. He did so with a special emphasis on the telecommunications and aviation industries. Not surprisingly, Japan seems to have a culture of deregulation as well, where potential competitors are, for instance, taken by their hand through a “Manual for Market Entry into Japanese Telecommunications Business.”

Deregulating developing economies presents a particularly arduous task. The unlikely reason is the subtle network of private long-term Build, Own, Operate contracts concluded between international investors and their local partners. Dr. Nagla Nassar, formerly with the International Center of Investment Disputes of the World Bank and now a partner in a Cairo law firm, quoted several standard clauses in full and explained them as creating a most unfortunate communality of those two parties' interests in sustaining the inefficiencies of such projects throughout their lifetime. Dr. Martin Heubel, General Counsel of Lurgi, with its worldwide contractor business, agreed: the highly competitive bidding stage usually soon gives way to a long-term dependency where moves towards privatization and deregulation risk jeopardizing the cashflow the contractor needs as a return on investment and the local partner welcomes as a revenue oriented fee.

### III. DEREGULATION IN CONTESTABLE AND NON-CONTESTABLE MARKETS

Nowhere would the mere undoing of regulation be enough, least of all in the contract-vetted world described by Nassar. The competition law of deregulation therefore, if it is to make the invisible hand truly work, implies what one could call—borrowing a term from the civil rights movement—affirmative action. Competition law proper, as John Temple Lang put it in his discussion of Professor Günter Knieps' essay, must be supplemented by regulation in the sense of legal rules designed to clear the bottlenecks left behind from the happy times of government owned or government organized monopoly. Referring to telecommunications but introducing categories of broad applicability, Günter Knieps of the Freiburg Institute of Transportation and Regional Policy, called for special rules to deal with transactions between contestable networks (e.g., telephone servers) and non-contestable bottlenecks (e.g., access to cables, entries in directories, etc.). Dr. Temple Lang, Director of the European Commission's division of competition law in the telecommunications and media industries, voiced no objections. He added, though, that even after the usual transitory period some regulatory law may continue to be needed to safeguard standards, sustain universal service, or pursue other public policy objectives.

### IV. INDUSTRIES IN THE PROCESS OF DEREGULATION

#### A. *Telecommunications*

The trouble is that clearing bottlenecks is easier said than done. In the real world, the notion of essential facilities must, according to Knieps, be assessed by reference to the terms of access to the respective bottleneck market, which eventually comes down to evaluating prices with some risk of overregulation. Germany provides the ready example. Part of the former Federal Ministry of Telecommunication, while taking some additional staff from the Federal Cartel Office, was transformed into the center piece of a regulatory authority to supervise the conditions of access to the network, which is still owned by the former monopolist. Helmut Schadow, Head of Division with the Federal Ministry of Telecommunications and Post, gave a detailed report of its first nine months of vigorous activity. His favorable

account of falling prices and rising standards was fully confirmed by Rainer Liebich who was able to contribute the perspective of the former general manager of AT&T, i.e., one of the most potent potential entrants into the German telecommunications market. Liebich described the industry as technology driven and observed that whenever the scope for product differentiation was exhausted, a shake-out would seem inevitable given the large number of market participants.

### B. TV

Structural activity, even though innovation is still going strong, characterizes the newly if incompletely deregulated TV market in Germany. Should that product market be considered split into separate free television ("TV") and pay-TV markets? Dr. Markus Wagemann of the Federal Cartel Office said yes, and Dr. Ulrich Koch, General Counsel of Bertelsmann, one of the world's largest media groups, implicated a negative response. No matter whether German free-TV and pay-TV are considered one market or two separate, adjacent markets, concerns with anticompetitive spill-over effects from a pay-TV merger seem genuine and may well have contributed to Bertelsmann's withdrawal from a recent joint venture project with the Kirch group. Referring to the ninety percent duopoly dominating the Italian TV market, Claudio Cocuzza, a practicing lawyer from Milan, reminded participants of the pluralist ideals that should be pursued by any competition and/or regulatory policy in the media industry.

### C. Aviation

If the European record of deregulating telecommunications is good and if the record of deregulating the TV industry is at best mixed, aviation is certainly lagging behind. Some of the reasons listed by Dr. Romina Polley of the Oppenhoff & Rädler law firm relate to the bilateral structure of the market with regard to third state routes. The closed sky premise of the 1944 Chicago Convention<sup>1</sup> can only be opened up by bilateral agreements between the two states at each end of a particular route.

In view of the uneven number of attractive destinations, Dr.

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1. Convention on International Civil Aviation, Dec. 7, 1944, ICAO Doc. 7300/6.

Robert Wolfger of Austrian Airlines expressed his favor of continuing to have the open sky agreements with the United States negotiated by individual Member States rather than the European Union as a whole. Slots at airports with hub functions, frequent flyer programs, and above all combined pricing for transit passengers, however, seem self-inflicted obstacles to creating truly contestable aviation markets. The basic tenets of the bottleneck theory expounded by Professor Knieps might help to remedy some of the shortcomings of airline deregulation and also help to remove some of the additional obstacles created by national carrier incumbents, which, according to Dr. Polley, have taken to building alliances rather than engaging in outright mergers.

#### V. *THE CHALLENGE OF GLOBALIZING MARKETS*

In many ways, both successes and failures of the competition law of deregulation result from an unprecedented expansion of geographic markets across national boundaries. It therefore seems worth examining at which level of political decision-making deregulatory activities should be decided upon. Wolfgang Kerber, professor of economics at the University of Marburg, briefed participants on the wealth of recent institutional economics theory of a "competition of systems." His own preference was with emphasizing the merits of assigning competences to the lower level of state and substate units. Friedl Weiss, professor of trade law at the Europa Institute of the University of Amsterdam, too, took a skeptical stand and resisted climbing on the bandwagon of those lawyers and economists who propose to make competition law a WTO competence. The World Trade Organization should continue to do what it does best, which is to dismantle state imposed trade barriers in the pursuit of non-discrimination. Judge David A.O. Edward of the Court of Justice of the European Community ("Court") put in a note of caution. With the Court kept busy with numerous complaints of violations by Member States of EC rules on intra-community trade, he found the time not yet ripe for the pendulum to swing back to decision-making on state level.

The question of whether, in Kerber's scenario, jurisdictions should compete for investment in the same way as companies compete for sales was left open. So were many other questions

at the Weimar Symposium. To have raised them and elaborated upon them at greater length and with considerable expertise in this issue of *Fordham International Law Journal* may, however, serve present understanding and promote future study of that extra effort that must be taken with regard to the deregulation of regulated industries. It was the shared view of all participants that the problems should not be addressed just as they arise one by one. Instead, they should be looked at in the broader context of inter-industry and inter-state comparisons.

It falls upon the one guilty of all of the shortcomings—not of the competition law of deregulation itself but of its treatment before, during, and after the Weimar Symposium—to express his gratitude to the authors of the papers, to the participants of the Symposium including his colleagues Martina Haedrich, Heribert Hirte, Erich Schanze, and Rupert Windisch of the Jena and Marburg Universities' schools of law and economics for consecutively chairing the discussion, and to the student editors of the *Fordham International Law Journal* who did a marvelous job in coping with so many manuscripts from authors whose first language, in many cases, was not English. Another word of thanks is definitely owed to the members of the then team at the Jean Monnet Chair: Kerstin Bode, Dr. Marc Bungenberg, Christian Carius, Helge Heinrich, Jan Heithecker and Ellen Wohlleben. Unimpressed by the competition law of deregulation, Ulrich Beetz and Birgit Erichsson of the Weimar based Abegg-Trio and Bernhard Klapprott of the Weimar Franz Liszt School of Music, were the ones to set the priorities right. They played chamber music of Johann Sebastian Bach, another one time citizen of Weimar, and thereby gave life to the newly restored charms of the Belvedere, an early eighteenth century castle situated in a park just outside Weimar.